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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 562.

M. L. JEWELL, as Chief Overseer and Supreme Head of the Church of the Living God, the Pillar and Ground of the Truth,
Petitioner,

vs.

HON. ELMER D. DAVIES, United States District Judge,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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HON. ELMER D. DAVIES, United States District Judge,
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BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE.

The petition for certiorari states that there are four questions presented to this Court:

1. Whether mandamus is the proper method of reviewing a stay order granted by the United States District Court, where the reason given by the United States District Court for staying the action is that there is a former suit pending in a state court.

2. Whether the Federal District Court has the right, as distinguished from any inherent power over the control of its docket, to stay an action on the grounds that there is a former suit pending in a state court, and thus abdicate or surrender its jurisdiction.

3. Whether the petitioner's right to proceed with the trial of the federal action depends or is conditioned upon the fact that both the state and federal actions involve different parties and different issues, or whether this right to proceed exists independently of any such differences.

4. Whether the federal courts may determine questions of real property rights which may arise in an action properly before the federal courts, where the same questions, among others, may be involved in an action pending in a state court.

That these questions are not, however, presented by the record in this cause will be seen from the opinion of the Court of Appeals (R. 12-17).

The petition for writ of mandamus in substance stated that there were three factions of the Church of the Living God, the Pillar and Ground of the Truth, claiming title to certain real estate located in Nashville, Tennessee, and that petitioner, as the head of one faction, claimed the entire title, and filed suit in the United States District Court for the Middle District of Tennessee, praying that title to said property be decreed to be held for her, or her faction alone, and to declare that the other factions had no right, title or interest in said property. The petition further alleged that a motion to stay said suit was filed by M. F. L. Keith, the head of another faction, and that the motion was granted for the reason that a former suit was pending in the Chancery Court of Davidson County, Tennessee. In the petition for mandamus the petitioner did not allege that the United States District Judge had abused his discretion in grantnig the stay order, but alleged "that the Hon-

orable Court was without discretion to stay the proceedings in this Court" (R. 2-9, at p. 6).

A show cause order was issued to the United States District Judge, and upon motion M. F. L. Keith, the real party in interest, was allowed to file a brief, and to present oral argument, as amicus curiae (R. 10). The Court of Appeals held that "while other issues are involved in the District Court case, there is one important and probably the most important issue, the crux of which is common to both courts, and that is, who has the legal title to the church property." The Court then pointed out that in determining the question of title to real estate, the federal courts adopt and apply the decisions of state courts. Thus the District Court had jurisdiction over petitioner's case, and it therefore had power to make the stay order. The Court then very properly held that the question of the stay order was a matter within the discretion of the District Court, and it not appearing that there had been an abuse of such discretion the writ of mandamus would not issue.

After making the above holding on the substantive part of the suit, the Court of Appeals, by way of dictum, pointed out that the order of the District Court was an appealable order, because, although it was interlocutory and did not in express words grant an injunction, it stayed proceedings in petitioner's case as effectively as if petitioner had been specifically enjoined. Having thus the substantial effect of an injunction, the order was appealable (Section 1292, Title 28, U. S. Code), and, therefore, mandamus was not the proper remedy (R. 12-17). The questions presented in the petition for certiorari do not mention the real issues in the case here presented—whether or not the United States District Judge abused his discretion—but proceed on the theory advanced in the petition for mandamus, that it is a matter over which the District Court had no discretion.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

POINT A: Whether mandamus or appeal is the proper method of reviewing same, an order of the United States District Court staying an action because a former suit is pending, is a discretionary order, and will not be dissolved in the absence of a showing that there was an abuse of such discretion.

POINT B: An order of the United States District Court staying an action for the reason that a former suit is pending in a state court, is discretionary.

POINT A.

Whether mandamus or appeal is the proper method of reviewing same, an order of the United States District Court staying an action because a former suit is pending, is a discretionary order, and will not be dissolved in the absence of a showing that there was an abuse of such discretion.

Petitioner by-passes the real issue, and ignores the holding by the Court of Appeals that there was no showing of any abuse of discretion, and challenges the statement in the opinion that the order of the District Court is appealable. Relying on what appears to be a conflict in procedure between the Second Circuit, and this portion of the opinion in the present case, petitioner seeks this opportunity to have the substantive portion of her petition re-examined. It is submitted that this Court will not grant the writ of certiorari in order to discuss what might be a conflict of opinion on a question of procedure when it is apparent that there is no merit in the substantive portion of the

case. This is particularly true when the question in the suit concerns title to real property, a question that is to be determined by the decisions of the state court. Beauregard v. City of New Orleans, 59 U. S. 497, 15 L. Ed. 469; Ruhlian v. New York L. Ins. Co., 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290; Palmer v. Hoffman, 318 U. S. 109, 87 L. Ed. 645.

Petitioner states that the decree of the Court of Appeals is in conflict with the decisions of other Circuits and in conflict with the decision of this Court. As authority for this statement petitioner cites the cases of Mottolese v. Preston (C. C. A. 2), 172 Fed. (2d) 308; Mottolese v. Kaufman (C. C. A. 2), 176 Fed. (2d) 301; McClellan v. Carland, 217 U. S. 268, 54 L. Ed. 762. While it is submitted that the question of whether or not a stay order in any particular case is appealable depends on the facts in each particular case, it is true that in the case of Mottolese v. Preston, supra, an order staying the suit—with leave to the plaintiff to move to vacate it—was held not to be appealable, and thereafter in the case of Mottolese v. Kaufman, supra, a petition for mandamus was filed which the Court held to be proper in that case. Counsel for respondent do not understand that these cases established, or attempted to establish, any general rule. If the Mottolese cases and the present case are construed as adopting conflicting rules, it is submitted that the rule in the present case should be followed, for certainly an order should be determined by its substantial effect. In any event, however, the writ of certiorari should not be granted in this case where there is no error, and where no error is claimed, in the holding of the Court on the real issues involved.

The case of McClellan v. Carland, supra, cited as authority for the proposition that the holding in the present case is in conflict with the decisions of this Court, does not substantiate such proposition. That case held that a

Circuit Court of Appeals may issue mandamus to compel a District Court to vacate a stay order in a particular case. With this rule all are in agreement. But the McClellan case has no further similarity to the case at bar. In that case a petition for mandamus was presented to the Circuit Court of Appeals, who denied the prayer and dismissed the petition. A petition for writ of certiorari was filed, and granted, and the Supreme Court held that upon the record as presented the Circuit Court of Appeals should not have denied the petition, but should have issued an alternative writ, or an order to show cause, in order that the District Judge might have been heard before the question was determined as to whether mandamus should issue or not. This is exactly the procedure that was followed in the present case, and upon the order to show cause issuing, the real party in interest, with the consent of the District Judge, who of course is only a nominal party, was allowed to file a brief and present oral argument, as amicus curiae.

Hence, Question 1 presents at most a procedural question, and whether the proper procedure is by appeal or by mandamus, in the absence of a showing of an abuse of discretion by the District Judge, the petition should be denied. Certiorari is a discretionary writ and as to questions controlled by state law, conflict among circuits is not of itself a reason for granting the writ, Ruhlian v. New York L. Ins. Co., supra, and the writ is not granted except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712.

POINT B.

An order of the United States District Court staying an action for the reason that a former suit is pending in a state court, is discretionary.

Questions 2, 3 and 4 in the petition for certiorari present only one issue. Is the granting of a stay order by the United States District Judge a discretionary matter?

Counsel for respondent cannot improve upon the opinion of Judge Hicks in regard to this issue. After pointing out that the one important issue in the suit that was stayed was who had legal title to certain real estate situated in Tennessee, and that this question would have to be determined by Tennessee law, the Court said:

"The district court, of course, had jurisdiction over petitioner's case and it therefore had the power to make the stay order. This is true because the power to make the order is incidental to the power of the court to control the disposition of the case on its docket. This power is not affected by the fact that the parties in the two causes are not exactly the same or that the issues in each were not identical. Landis v. North Amer. Co., 299 U. S. 248, 254; North Amer. Co. v. Landis, 85 Fed. (2d) 398, 402 (CA-DC). Mandamus does not lie to control the discretion of the Court in making the order unless it appears that its discretion (fol. 17) has been abused, and we find no such abuse of it here. Virginia v. Rives, 100 U. S. 314. Moreover, we are not authorized to grant mandamus here because we are specifically requested to command the District Judge to dissolve the stay order granted by him. This we cannot do. The extraordinary writ of mandamus will not issue to require a court to make a particular decision. Ex Parte Park, etc., v. Tilford, 245 U. S. 83, 85. It will not lie to compel a court to reverse or retract a decision such as is sought here. I. C. C. v. Waste Merch. Assn., 260

U. S. 32, 34; Ex Parte Slater, 246 U. S. 128, 134; Ex Parte Roe, 234 U. S. 70, 73; Ex Parte Wagner, 249 U. S. 465, 471; In re Rice, 155 U. S. 396, 403; Wilbur v. United States, 281 U. S. 206, 218. Furthermore, the general rule is that the writ of mandamus will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. Roche v. Evap. Milk Assn., 319 U. S. 21, 26; Internat. Contr. Co. v. Lamont, 155 U. S. 303. We have been cited to no statute or decision which makes it the plain duty of the judge to retract the order herein complained of. Wilbur v. United States, supra (281 U. S. 218). He might have revoked the order or modified it in his discretion but there is a wide field between such course and compulsion."

Of course, there are many other cases that restate the rule as announced (e. g., Armour & Co. v. Miller [C. C. A. 8], 91 Fed. [2d] 521), and review the reasons underlying same, but it is not thought necessary to burden the Court by attempting to analyze these cases here.

On page 20 of the petition for certiorari petitioner states: "The opinion of the Court of Appeals for the Sixth Circuit holds that the District Court may stay any type of action on the ground that there is a former suit pending, regardless of the existence of differences in the parties and issues in the state and federal courts, and is, therefore, in conflict with the Supreme Court and the other Circuit Courts of Appeals." This is an erroneous conclusion of the petitioner. The Court of Appeals prefaced its opinion by stating that the issue concerned title to real property and that this question would be decided by applying the decisions of the state court, and recognizing the comity between the courts, the rule was merely applied that issuing the stay order was a discretionary matter. This is far different from the summation given to the opinion by the petitioner.

Petitioner's bold statement on page 14 of the petition for certiorari that a United States District Court has no discretionary power to stay a suit because of a former suit pending in a state court will not bear careful criticism. Cases referred to for this rule are actions in personam and that rule is not here involved or questioned (e. g., Great North Woods Club v. Raymond, 54 Fed. [2d] 1017). Petitioner herself recognizes that the above rule is limited, for on page 17 of the petition she states that in exceptional cases a federal district court may stay such proceedings. Finally, though reluctantly, petitioner admits that where the proceeding is in rem, and the state court has taken possession of the property, the federal court has the discretionary right to issue a stay order (Petition for Certiorari, p. 19).

Petitioner did not discuss the next logical step, and while the Court of Appeals did not refer to it, there is another rule supported by a line of cases that sustain the decree of the District Court staying the suit. As pointed out by Judge Hicks the real issue in the suit stayed, and in the former suit pending in the Chancery Court of Davidson County, Tennessee, concerns title to a parcel of real estate situated in the State of Tennessee. Although in the petition for certiorari it is insisted that the issues and the parties are different, the only additional party in the federal suit is A. H. White of Philadelphia, Pennsylvania, who filed a disclaimer of interest, and while the issues appear to us to be exactly the same, it cannot be denied that they are substantially the same. Hence, since the real subject matter of the entire case is real property, and the state court has first acquired jurisdiction over the res, the rule announced in Kline v. Burke Const. Co., 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077, "that where the jurisdiction of the state court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same res to defeat or impair the

state court's jurisdiction'' is applicable. See Covell v. Heyman, 111 U. S. 176, 4 S. Ct. 335, 28 L. Ed. 390; Farmers' Loan & T. Co. v. Lake Street Elevated R. Co., 177 U. S. 51, 20 S. Ct. 564, 44 L. Ed. 667; Toucey v. New York L. Ins. Co., 314 U. S. 118, 62 S. Ct. 139, 86 L. Ed. 100; Princess Lida v. Thompson, 305 U. S. 456, 59 S. Ct. 275, 83 L. Ed. 285; Purcell v. Summers, 126 Fed. (2d) 390, 395; Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 5 S. Ct. 135, 28 L. Ed. 729.

CONCLUSION.

It is therefore respectfully submitted that there is no showing of any abuse of the discretionary power of the United States District Court and that therefore the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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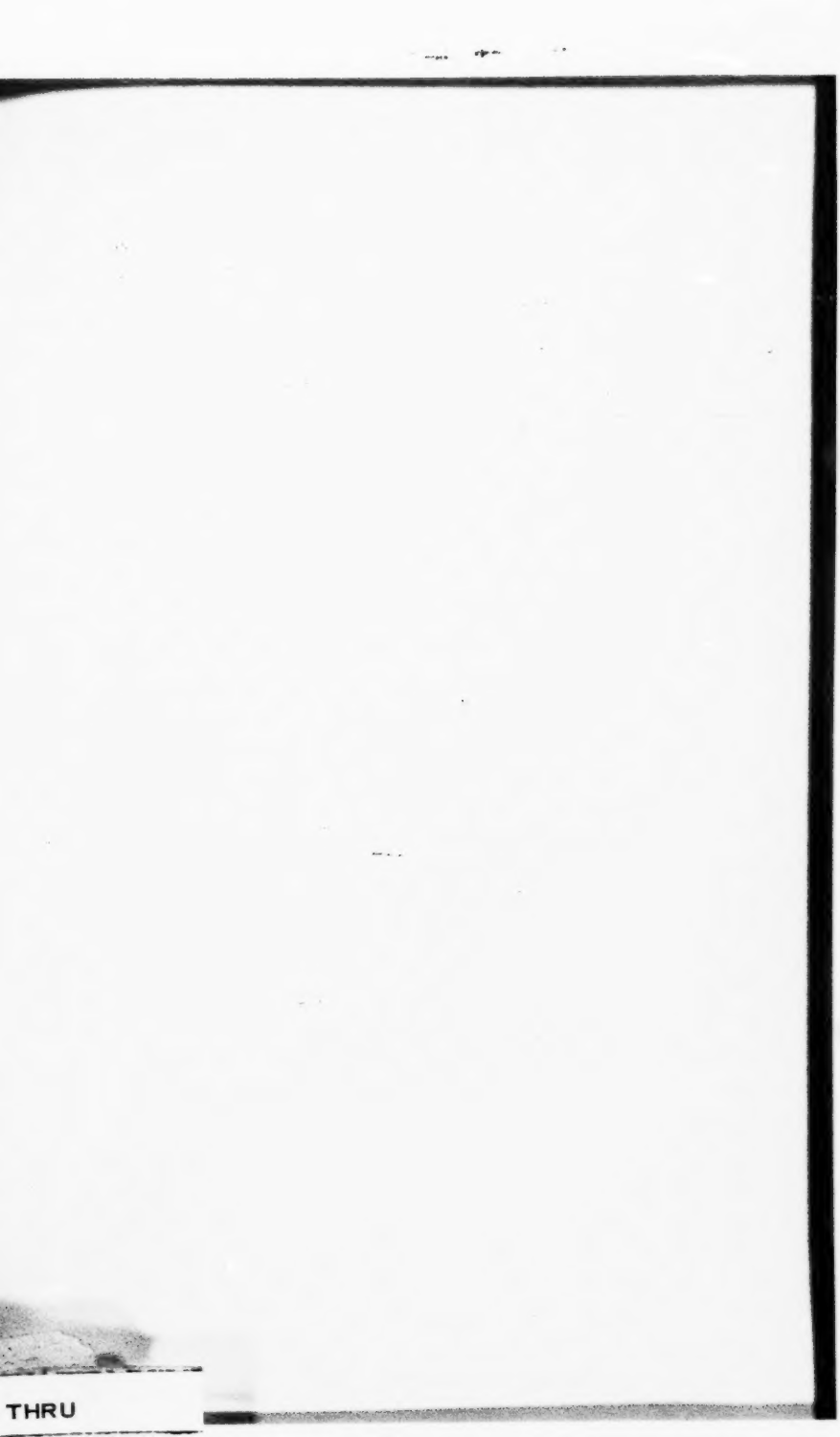
DARK PAGE BLEE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